IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MARTIN HOWARD, et al.,

Plaintiffs,

vs. Civil Action No. 17-1057

ARCONIC INC., et al.,

Defendants.

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Transcript of Video Status Conference on Tuesday, January 11, 2022, United States District Court, Pittsburgh, Pennsylvania, before Chief Judge Mark R. Hornak.

APPEARANCES:

For the Plaintiffs: Emma Gilmore, Esquire
David A. Rosenfeld, Esquire
Alfred G. Yates, Jr., Esquire
Gerald Rutledge, Esquire
Magdalene Economou, Esquire
Villi A. Shteyn, Esquire

For the Defendants: Paul Vizcarrondo, Esquire
Bradley R. Wilson, Esquire
Carrie M. Reilly, Esquire
David E. Kirk, Esquire
Melissa J. Tea, Esquire
Kiet T. Lam, Esquire
Daniel C. Lewis, Esquire

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Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

P R O C E E D I N G S

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(10:04 a.m., Zoom Video proceedings:)

THE COURT: This is a video status conference in Civil Action 17-1057. The first named plaintiff is Martin Howard, and the first named defendant is Arconic Inc.

We have a lot of people on the call. I appreciate everyone being here.

On for the Court, I'm Judge Mark Hornak. Also present is one of my law clerks, Ms. Nicole Agama. Our court reporter today, of course, is Ms. Sharon Siatkowski.

Let's make sure that I can put a name to a party with everyone. Why don't we go slowly. I understand, Ms. Gilmore, you're going to take the pilot seat for the plaintiffs today. Nice to see you.

MS. GILMORE: Good morning, Your Honor. Yes, I will. Emma Gilmore, from Pomerantz, on behalf of the plaintiffs.

THE COURT: Great to see you. Who else is on the call -- we'll go slowly -- for the plaintiffs' side of the case?

MR. ROSENFELD: Good morning, Your Honor. David Rosenfeld, Robbins Geller.

THE COURT: Mr. Rosenfeld, nice to see you.

MR. ROSENFELD: Same here.

THE COURT: Next, for the plaintiffs?

MR. YATES: Al Yates, here in Pittsburgh, Judge.

THE COURT: Okay, Mr. Yates. Nice to see you.

MR. RUTLEDGE: Gerald Rutledge, Your Honor.

THE COURT: Mr. Rutledge, nice to see you.

Anyone else for the plaintiffs?

MS. ECONOMOU: Good morning, Your Honor. Magdalene Economou, from Robbins Geller, on behalf of the plaintiffs.

THE COURT: Great, and you're on audio. Nice to see you, Ms. Economou.

MR. SHTEYN: Good morning, Judge. Villi Shteyn from Pomerantz, also for the plaintiffs.

THE COURT: Okay. Oh, okay. Good to see you, Mr. Shteyn.

Others for the plaintiffs?

MS. GILMORE: That's it, Your Honor.

THE COURT: Okay. For the defense, I understand that Mr. Vizcarrondo is going to be the lead speaker for the defense. Good to see you, sir. Happy New Year to you and everybody else on the call.

MR. VIZCARRONDO: Same to you, Your Honor.

THE COURT: Who's next up for the defendants?

MR. WILSON: Good morning, Your Honor. Bradley Wilson from Wachtell Lipton.

THE COURT: Mr. Wilson. Next?

MS. REILLY: Good morning, Your Honor. Carrie Reilly from Wachtell Lipton.

THE COURT: Ms. Reilly, nice to see you.

MR. KIRK: Good morning. David Kirk, Wachtell Lipton.

THE COURT: Mr. Kirk, nice to see you.

MS. TEA: Good morning. Melissa Tea from K&L Gates, for Arconic.

THE COURT: Ms. Tea, I see the Golden Triangle behind you.

Mr. Lam, you were next.

MR. LAM: Kiet Lam for defendants as well.

THE COURT: Mr. Lam, nice to see you.

MR. LEWIS: Daniel Lewis from Shearman & Sterling, Your Honor, for the underwriter defendants.

THE COURT: Okay. And I see a Ms. Montgomery and a Mr. Wilson. I feel like I'm Miss Janey in Romper Room when I see who I see.

Mr. Wilson, how do you fit into the big picture here? Oh, you already identified yourself. I apologize.

MR. WILSON: That's okay. Yes. I'm with Wachtell Lipton.

THE COURT: Ms. Montgomery?

MS. MONTGOMERY: Good morning, Your Honor. Kate Montgomery. I'm in-house counsel for Arconic.

THE COURT: Okay. Nice to have you with us.

Anybody not identified themselves? We have somebody on the phone that ends with 3243.

MS. GARRAUX: Good morning, Judge. It's Lauren Garraux from Howmet Aerospace.

THE COURT: Ms. Garraux, nice to hear from you.

Is there anybody that has not either spoken up or that I've not identified?

(Brief pause in the proceedings.)

THE COURT: Okay. Well, thanks, everyone, for being available and for being here.

I set this as a status conference because Mr. Yates raised the issue of having a status conference. And it's our practice here, if any lawyer in any case asks for a status conference, we convene one, absent some extraordinary circumstances that I've not run into in ten and a half years. So it's sort of an automatic.

And then I concluded, well, if we were going to have a status conference, the odds were pretty high that we'd see all of you folks. And therefore, I thought if anybody had anything they wanted to say regarding the pending motions for 1292(b) certification from the Court, in fairness, I should make sure we set aside a little time to hear from you if there's anything you want to add to the papers that have been filed.

So, Mr. Yates, why don't we start with you. You got the ball rolling. Utilizing our published chambers' procedures of counsel can call the office anytime to ask for a conference or for some procedural thing to happen, which you did, so happy

to hear from you, sir.

MR. YATES: (Muted.)

THE COURT: You're on mute, Mr. Yates.

MR. YATES: That would be fine, Judge. I'd be happy to, but I think Ms. Gilmore's taking the lead on that. But I could proceed.

THE COURT: Happy to have you lateral to Ms. Gilmore. Ms. Gilmore, happy to hear from you. Thanks, Mr. Yates.

MS. GILMORE: Thank you, Your Honor. The Court denied in part defendants' motion to dismiss the complaint, and the automatic discovery stay of the PSLRA has been lifted.

THE COURT: Yeah. I have to say, I suspect the defendants will characterize it as I granted most of the motion to dismiss and denied it in part.

MS. GILMORE: Be that as it may, there are claims that have been denied and that -- claims that have been granted. So --

THE COURT: So we have two left; right? The 10(b) claim and the Section 11 claim; right?

MS. GILMORE: That's correct, Your Honor. And plaintiffs are eager to commence discovery. This case has been pending since November of 2018. Plaintiffs did reach out to meet and confer with defendants to start discovery. Defendants have refused, and their position is that they are -- should not be engaged in any discovery because there is a pending motion to

certify an issue for interlocutory appeal in front of Your Honor.

Of course, we would like to proceed on discovery if that motion doesn't stay the case in any way. So we respectfully are asking the Court to direct the parties to commence discovery in this case.

THE COURT: Okay. And 1292(b) says that either the filing or the grant of a motion does not stay the case unless either I or the Court of Appeals stay the case.

MS. GILMORE: That is correct, and such motions are typically granted only in extraordinary circumstances. We cited a Third Circuit opinion for that proposition. This case doesn't fit the extraordinary circumstance box by any means.

I do have some points to make about the defendants' motion, but I don't know if Your Honor would like to first hear from defendants since it's their motion.

THE COURT: We'll swing around and give you a chance in opposition, Ms. Gilmore, to the substance of the certification motion.

I will say this, and I'm pretty confident given the horsepower of the lawyers that are on this call, you already know that in ten years, 3,300 civil cases, I've granted two 1292(b) motions. I've stayed the case in both of them. Both of them were accepted by the Court of Appeals. And just like they say on the television commercials, you know, past performance is

no predictor of future returns.

But I will say, I have in each of the two cases, one involving the IDEA and the special education rules that apply in the federal courts and the other regarding the interaction between two separate provisions of the United States Bankruptcy Code and the reach of the automatic stay and the reach of the discharge provisions, I did stay it at least until the Court of Appeals decided what to do.

I've not entered a formal stay order here; you're absolutely spot on, Ms. Gilmore, and that's probably a flaw on my case management activities.

But I will say this: The odds are extraordinarily high that if I grant the certification motion, I'm going to formally stay the case at least until the Court of -- one, we see if Arconic actually files the motion -- I have no reason to doubt that they would -- with the Court of Appeals. That's a pretty fast turnaround. That's ten days. And then we would see what the Court of Appeals does. Obviously, if they decline to take the case, which they may or may not explain, if that's the route that they take, then off to the races.

On the other hand, if they do take the case, then it's likely I would keep the stay in place. But I would -- you know, if somebody thought we should have further discussion about it at that time, it would be such a significant change, it seems to me, in the turf, if you will, of the case, that that equation

may change. But you're dead on on the law, Ms. Gilmore. I don't disagree that you've outlined the law.

So, Mr. Vizcarrondo, before we hear from you, I do have some questions about the motion and the response. And we'd hear from you first on that and then Ms. Gilmore. And then since you're the moving party, Mr. Vizcarrondo, we'd give you the last say on it.

But in terms of not the merits of the motion but anything else about the status or other things in the case, if there's anything you'd like to talk about, happy to hear from you.

MR. VIZCARRONDO: No, Your Honor. I mean, we do agree that if the Court granted us leave to appeal and the Third Circuit takes the appeal, a stay would be entirely appropriate because it would undercut the whole purpose of seeking an interlocutory appeal. If the case went forward on such matters as class certification and merit discovery, it would not be at all clear what the scope of the case would be. What the class would be and what the scope of the case would be. So I don't have anything more to add to that, Your Honor.

THE COURT: Okay. Appreciate that, Mr. Vizcarrondo.

Ms. Gilmore, I do have a couple of questions for you so I can make sure I understand your opposition papers because they fold into some of the points that were made in the moving papers and in the reply papers.

Should I operate from greeting the opposition that the plaintiffs' view is that if this motion had never been filed, that the discovery that would take place in this case, if it were only the 10(b) claim that survived or only the Section 11 claim that survived, the discovery would be identical; there's no difference?

MS. GILMORE: The discovery pretty much overlaps. I know the defendants are arguing that there will be less discovery for Section 11 claims only. But what we're saying is --

THE COURT: That's a strict liability. Section 11 is a strict liability claim; right?

MS. GILMORE: That's correct. That's correct. However --

THE COURT: So what somebody was thinking, will it be -- if the only claim in the case, if the only claim the plaintiffs had brought -- I'm not saying you did -- but if the only claim you had brought was a Section 11 claim, would anybody care what anybody was thinking when they issued certain statements, or is it strict liability?

MS. GILMORE: Well, there is an element of knowledge that has to be an element of knowledge that will be part of discovery because all -- the statements have to be false and misleading when made. And typically, defendants raise the argument that nobody knew about those -- the statement that

there was a misconduct -- and therefore those statements were not false and misleading when made. And that's part of the claim for Section 11. It's part of one of the elements. So knowledge would be an issue.

THE COURT: So would the discovery be any different if it was just a Section 11 claim in the case or if it was just a 10(b) claim in the case?

MS. GILMORE: Our position is that it wouldn't be. It would be substantially overlapping, the same as a 10(b), because you still have that element of knowledge that you have to show.

THE COURT: Okay. Now, in looking at the Court's opinion, and I recognize the ground may have changed since June 23, 2021, when we issued it, but on page 40 -- I'm looking at the ECF number, but it happens to be the same as the page number -- the first full paragraph begins with the phrase: "There remains a circuit split about the corporate scienter doctrine." And then there's the vantage string cite with parentheticals.

Do you believe that was -- and if it is, no offense will be taken. I read your papers. One inference that could be drawn from the papers in opposition is there's not a circuit split, that -- because the defense's argument is it's not a -- forget about the one, two, three levels of scienter that might meet the test. The defendants' papers could be fairly -- yeah, could be fairly read as saying it's not a given that corporate

scienter, that is scienter that is attributed to the organization rather than flowing from the state of mind of another named defendant, is not a universally recognized theory of 10(b) liability.

And, at least I thought, when we put that part of the opinion together, that it was not a concluded issue. Before you even get to the magnitude or the level or the juice of the scienter, the whether was not yet uniform. And that's why I used the phrase "there remains a circuit split."

Do you believe that, whether it was accurate then or not, as of today, there is not a circuit split on the question of whether corporate scienter could be the basis of 10(b) liability?

MS. GILMORE: I think there isn't a circuit split in the sense that the circuit courts have recognized the existence of the doctrine of corporate scienter. And then there are nuances into what and to what that falls under, whether it's a broader view of corporate scienter, a middle ground view, or the narrow view. But there's no circuit court that has rejected the doctrine of corporate scienter. So in that sense, there isn't a split at all.

THE COURT: So using the magic language of 1292(b), and let me get that handy here. Give me one second. You folks probably have your papers organized better than I do. So the plaintiffs do not believe that there is currently a substantial

ground for difference of opinion as to whether corporate scienter is a theory of liability that could support a 10(b) claim?

MS. GILMORE: That's correct, Your Honor. And we also believe that this Court has not decided a controlling question of law because it has not picked the standard of scienter over another one of the -- you know, it hasn't picked the broader standard, the narrow, or the middle standard. It simply surveyed the law of corporate scienter as it exists and applied it to the facts of this case.

THE COURT: Yeah, but my next paragraph on page 40 begins with the following: "The Third Circuit is not definitively weighed in on this question, stating that it has, 'neither has accepted nor rejected the doctrine of corporate scienter in securities fraud actions,'" citing to the Rahman case.

And then my colleague two floors down, Judge Phipps, in the PAMCAH-UA Local 675 non-precedential opinion that I know you all know about because you talked about it from August 5th of this year, he says, "The investors then seek to impute the alleged mental states of those executives to BT Group by urging this Circuit to adopt the so-called 'corporate scienter doctrine.'" And then he goes on to say -- he talks about why it wouldn't fit on the facts of the case if it existed.

So doesn't the fact that the Court of Appeals for the

Third Circuit, our regional Court of Appeals, has seemingly noted the existence of the doctrine but hasn't accepted or rejected it but keeps noting it, doesn't that indicate -- and then all of the litigants that were litigating those cases obviously took different positions on it, and we have Judge Salas's opinion and some other opinions, Judge Phipps's opinion. Doesn't that show that there's a substantial difference of opinion currently on whether the doctrine itself, irrespective of what octane level of scienter would fit the bill, isn't there a substantial grounds for difference of opinion as to whether that theory of liability even exists?

MS. GILMORE: I don't believe so, Your Honor, as in the sense that every circuit that has addressed their issue has recognized it. The Third Circuit has never said it refuses to recognize the doctrine of corporate scienter. It had at least five occasions in the past few years. In each case it left each to be decided by the capable hands of the district court judges by surveying the law, applying the law to the facts of the case. And here, the Court surveyed the law and determined that even -- that the complaint of plausibility can impute scienter even under the more narrow nuance of the corporate scienter doctrine.

THE COURT: Okay. Appreciate that. Let me see if I have any other preliminary questions for you before I turn to Mr. Vizcarrondo, and then of course we will circle back to you, Ms. Gilmore.

MS. GILMORE: Okay.

THE COURT: I think those are the only questions I have for you at the moment, Ms. Gilmore, but we'll hear from you substantively.

Mr. Vizcarrondo, the first question I'd have for you -- thanks, Ms. Gilmore. Appreciate you bearing with me on the questions, and we'll make sure we swing back around.

MS. GILMORE: Thank you.

THE COURT: Mr. Vizcarrondo, the plaintiffs argue in their briefs on this question that I really shouldn't spend a lot of time on it because Arconic waived it. That Arconic has never argued that the corporate scienter doctrine as a doctrine doesn't apply. What do you say about that? What do you think about that?

MR. VIZCARRONDO: That's not correct, Your Honor. As we cite in our reply brief -- we cite citations to our briefs in the motion to dismiss below. We expressly held -- we expressly argued that there was no -- that the scienter of the only corporate officer who was alleged as a defendant, Klaus Kleinfeld, was not adequately pled, and therefore the claim against him had to be dismissed. And that once the claim against him had to be dismissed, there was no basis for corporate scienter or for finding corporate scienter against Arconic Inc. because the law requires that a -- that there be a well-pled claim of corporate scienter -- of scienter by a

corporate defendant. We also --

THE COURT: But that argument sort of almost sounds like the corporate scienter assertion fails because the individual scienter assertions as to Mr. Kleinfeld failed as opposed to an argument -- and there may be areas in between, so I may be setting out polar opposites here -- as opposed to an argument that says: If there had never been a 10(b) claim asserted against Mr. Kleinfeld, or more precisely there had never been an argument even made that his state of mind should be imputed to Arconic, that to the extent the plaintiffs would attempt in the past or in the future to say there are all of these other people, they weren't officers, but they were people in the know, and their mens rea, if you will, their scienter, should be chargeable back to Arconic.

At least when we wrote the opinion here, I had operated on the understanding that part of Arconic's argument is: That doesn't cut it. You can use any of the three levels; you can have sort of the scienter in the ether, if you will. But the idea that there's organizational scienter that has its genesis in anything other than the personal scienter of a named defendant just doesn't fly, doesn't exist. That's not a theory of attaching liability. And that's part of what I understand Arconic's argument to be now. And the plaintiffs say you've never really articulated that argument, therefore you can't raise it now.

MR. VIZCARRONDO: Well, Your Honor, with all due respect, that is not a correct position. We did survey the state of the law in the Third Circuit with respect to corporate scienter, and we noted that the Third Circuit had never -- had never adopted the notion of corporate scienter. And that in the Roseville case it stated that if a corporate scienter were viable in the Third Circuit, and it did not state that it was, it would require circumstances that were so extraordinary that it would have been impossible that there were not members of corporate management that were aware of it. And they gave the example of General Motors stating that it had sold a million SUVs when in fact it sold none.

We also expressly pointed out that with respect to the basis that the Court's opinion ultimately found corporate scienter, the alleged scienter of employees of a foreign subsidiary, that the Third Circuit had indicated that that would not be a sufficient basis.

Now, I will note that following Your Honor's opinion -- at the time of Your Honor's opinion, you did not have the benefit of the Third Circuit's opinion in the PAMCAH-UA local case, which was decided in October of last year. And in that case, the Third Circuit rejected corporate scienter where there was no adequately -- there was no claim pled against any individual corporate officer, and the scienter of the corporate defendant was sought to be pled on the basis of the allegedly

fraudulent activity of officers of a subsidiary.

And the Third Circuit said that that would not be an adequate basis for pleading the scienter of the corporate defendant in the absence of allegations of participation by the corporate defendant, such as in a cover-up, none of which is alleged here.

So certainly on the basis of that opinion, there is a substantial issue that we believe the Third Circuit should be allowed to address as to whether Arconic Inc.'s scienter on the 10b-5 case here can be based upon the alleged scienter of these two employees of an indirect foreign subsidiary.

THE COURT: Let me ask you a question on that point, Mr. Vizcarrondo.

In looking at Judge Phipps' opinion in the pension fund case, the 675 pension funds case, at Headnote 3, it's in the Westlaw version, it reads: "The allegations regarding executives at BT Italy fall short, too. Those executives, CEO Giancarlo Cimini and CFO Luca Sebastiani, worked at BT Italy, a subsidiary of BT Group. But 'parent companies are not, merely by dint of ownership, liable for the acts of their subsidiaries,'" citation to a case. And he goes on to say, "Even if our circuit embraced the corporate scienter doctrine, the investors would still need to plead that BT Group participated in BT Italy's alleged fraud - for example, through a cover-up." Cites to another Third Circuit case. "Here, the

investors make no such allegations."

Now, I did not go back and read the underlying pleadings in that case, and maybe that's a flaw on my part, but what I read Judge Phipps is saying there is: It's not that somebody that's an officer or an employee or an agent or a manager of a subsidiary can't ever be the generator of the requisite level of scienter, but rather, the fact that they are one of those things doesn't do it. You have to show a level of active engagement.

And at least as I understood what we wrote here in our opinion, the two -- it held that it was sufficiently plausible under the second amended complaint that the allegations regarding Wehrle and the other gentleman showed enough of a factual connection between what they knew and did in Arconic that the corporate scienter doctrine could go forward, not -- so I didn't hold that because they were part of a subsidiary it was enough but because there were sufficient factual allegations. And maybe it wasn't a cover-up, is the language that's used in the 675 pension fund case, but it was separate facts.

So I'm not sure either the opinion here or Judge Phipps's opinion go quite as far as Arconic argues, and as a definitional matter take out of the scienter equation anybody that happens to work for a subsidiary, whether it's domestic or foreign.

But help me understand. That seems to be a really

important part for the defendants in their motion.

Am I misapprehending that point in your motion? And whether I am or not, it does seem to be a definitional argument from the defendants. The fact that Wehrle and this other fellow were at a subsidiary definitionally takes them out of the scienter conversation. So help me have a better understanding of that position by Arconic.

MR. VIZCARRONDO: Yes, Your Honor. As I understand your opinion, you found that because Mr. Wehrle and Mr. Schmidt were -- had knowledge of the failed tests of the Reynobond product and either failed to disclose them to the BBA or to customers, that was sufficient to show their scienter, their knowledge of misleading communications with the BBA and customers.

And then, as I understand your opinion, you said that that would be sufficient to -- could be sufficient to establish the corporate scienter of the named corporate defendant, Arconic Inc., because they had been deputized by Arconic Inc.

THE COURT: My phrase, not yours. And I note that.

MR. VIZCARRONDO: Correct. Correct.

You know, I don't want to argue with you or quibble with you as to whether or not in fact they were in fact deputized or whether there were allegations that they were deputized.

But what there clearly isn't is any pled facts, well

pled or not, that anyone at the corporate entity, the corporate entity that is named as a defendant in this case, knew of and participated in the activity that Your Honor found on -- established the scienter of these two employees of the foreign subsidiary. And I think that that falls smack within the reasoning of the 675 pension case.

THE COURT: So let me ask you this also -- and that's very helpful, Mr. Vizcarrondo; I appreciate that. Let me ask you this: The plaintiffs say in their response and in the supplemental declaration of Ms. Gilmore, which I directed somebody on the plaintiffs' side to file, that there is an individual -- and I apologize if I misstate her name -- Dianna or Diana Perreiah?

MR. VIZCARRONDO: Perreiah.

THE COURT: P-E-R-R-E-I-A-H. And the plaintiffs say that they -- at least as of the date of this filing, August 18th of '21, they would be in a position to amend further, generate a third amended complaint, which would be the fourth substantive pleading in the case from the plaintiffs' side. That would involve Ms. -- it's Perreiah, Mr. Vizcarrondo?

MR. VIZCARRONDO: I believe, yes, Diana Perreiah.

THE COURT: That Ms. Perreiah, in her knowledge and her communications, would buttress the corporate scienter of the scienter allegations as to the 10(b) claim against Arconic.

If the plaintiffs had in the second amended complaint

put in all of the things that they now say they would be in a position to put in a third amended complaint, how would that have impacted the defendants' 10(b) argument as to Arconic then and as to its motion now?

Because one of the plaintiffs' arguments -- and if I get this wrong, Ms. Gilmore will correct it when we turn to her -- they say one of the reasons I shouldn't certify this is they could amend one more time. And if they did amend one more time -- well, actually, they could amend at least one more time -- and if they did do that, they put all of these new information in and it would be beyond dispute that that would be, from a pleading standpoint, sufficient to meet the corporate scienter standard.

What do you think about that?

MR. VIZCARRONDO: Well, Your Honor, first of all, they don't have a right to amend again. But putting that aside, whether they'd be permitted to amend again, we go through in our reply brief these newly discovered "hot documents" with some granularity.

And I will say this. Generally, the documents do not -- do not -- suffice to base a claim against any individual. They do not suffice to base a 10b-5 claim against Diana Perreiah. If they did, then that might make a difference because you'd have a -- well, first of all, Diana Perreiah was not an officer of Arconic Inc. But let me put that aside.

If they provided documents that would establish a basis to plead a claim against an officer of Arconic Inc., then that might make a difference. These documents do not do that. And they're not claiming that they could amend to name Diana Perreiah or anybody else as an individual defendant. So that would not be a sufficient basis to plead corporate scienter.

And as to whether or not these documents would meet the standard of showing Arconic Inc.'s participation in the fraud -- alleged fraud by Mr. Wehrle and Mr. Schmidt, they do no such thing.

The only thing that they show is that Diana Perreiah, who was the head of a separate United States-based unit of Arconic Inc., sent some questions to -- I forgot which it was -- Mr. Wehrle or Mr. Schmidt about the product that was manufactured by their subsidiary and asked some questions about fire safety standards and other things in regard to Europe that she was not familiar with. That is it.

So if anything, it shows she did not know anything about this Reynobond product, let alone that she knew that it had failed any product safety tests or that there was any misleading disclosures about whether this product had failed any product safety cases. It does not establish at all any involvement by anybody at the Arconic Inc. level in whatever actions or scienter were had by these two employees of the French subsidiary.

THE COURT: Appreciate that, sir. Let me ask you two more questions and then I'll give you some freeform opportunity to tell me anything else you want.

Now, I'm going to make an observation. Because I know Ms. Siatkowski is taking this down, this could sound like it's critical of my colleagues on the Court of Appeals for the Third Circuit; it's not, either in intention or result. But in the Ellis case, which is the most recent case that I certified, in Judge Ambro's opinion for the court, one of the things he referenced was a principle of circuit law that says when there is a 1292(b) certification and it's accepted, it's not quite as rigid as the Supreme Court applies their review within the questions fairly presented for cert. But what Judge Ambro said was: We really only addressed the things that have come to us on interlocutory certification.

Now, I will say in the first case that I granted 1292(b) certification in and the Court of Appeals took -- it's called GL vs. Ligonier Valley School District -- the decision that I had issued ended up being affirmed for reasons that, in my estimation, bore no resemblance whatsoever to the reasons that I had granted the relief here. But it was representative of the principle that appellate courts review judgments, not opinions. So the judgment was affirmed but for completely different reasons. It didn't -- in my estimation, the Court of Appeals used an entirely different analytical model to reach the

conclusion that the ultimate judgment was right.

The reason I give that background is the proposed questions that you're asking me to send up on 1292(b) certification, the first one appears to be about as pure a question of law as there exists. And I want to quote it directly.

This is on page 6 of ECF 144. Question 1: "Whether the scienter required to state a claim under Section 10(b) of the Securities Exchange Act of 1934 against this corporate defendant can be pleaded under a theory of 'corporate scienter.'"

It strikes the Court that's a pure question of law, and it's one that our Court of Appeals has not answered.

Question 2 is: "If so, whether plaintiffs' allegations concerning employees of a foreign subsidiary of Arconic satisfy whatever requirements for corporate scienter may be pronounced by the Third Circuit."

That one sounds to me to be a bit more, at least facially, a question of the application of law to facts, or at least law to pled facts, and therefore may be less consistent with the principle of a 1292(b) certification.

And Ms. Gilmore -- among the arguments that the plaintiffs make in opposition to the motion is that -- that this is really pretty fact bound, Judge. It's really fact bound, Judge. And we are in a position to make it even more fact bound

if you let us amend one more time. And if you send this up, part of -- and Ms. Gilmore didn't say it quite this way but it's implicit, and it's fine -- part of their opposition to the circuit taking it is going to be: Don't take it, Court of Appeals, because we're going to ask Judge Hornak for leave to amend. Under your law, he's probably going to have to grant it. Here's what the amendment's going to say. And when we amend that way, it's going to obviate this as being a controlling question of law. That's, at least, part of the argument I hear the plaintiffs make in opposition to your motion.

What do you think about all of that, Mr. Vizcarrondo?

MR. VIZCARRONDO: Your Honor, there clearly is a question of law as to whether the scienter -- that if the Third Circuit is going to recognize -- finally recognize the existence or the application of Third Circuit, their theory of corporate scienter, whether as a matter of law that would require a claim pled against a corporate officer of a corporate defendant, or whether it can be satisfied by allegations of scienter by the employees of a foreign subsidiary in the absence of allegations of active participation by the corporate parent in the subsidiary's fraud.

Now, you know, they can tell the Third Circuit that we're going to amend again or we're going to put in these documents that show whatever they show. And, you know, we could argue in the Third Circuit that if they -- if the standard is --

if the Third Circuit would allow corporate scienter just on the basis of the scienter of employees of a foreign subsidiary but it would also require active participation by the corporate defendant, you know, we can argue with the Third Circuit as to whether or not these additional documents show that. I think the Third Circuit can see it and they could, perhaps, make that decision. Or they could say, well, we're going to leave that to Judge Hornak to sort through whether these allegations are sufficient. But we rule as a matter of law that if there is no claim against an individual corporate officer, you could only establish the scienter of the corporation on the basis of the scienter of employees of a foreign subsidiary if there are well-pled facts of the corporate defendant participation in the fraud, such as by a cover-up, and leave it to you to apply that ruling of law to whatever the allegations may be.

THE COURT: Appreciate that, sir. And last question before I give you a chance to sum up more generally. Ms. Gilmore, in her papers -- well, I'm not sure -- I don't want to -- not that there was anything wrong with them; I think Ms. Tea actually signed them. The plaintiffs in their papers, and Ms. Gilmore today in response to my questions, said that for all intents and purposes, if the only claim left in this case was a 10(b) claim, or the only claim left in this case was a Section 11 claim, the discovery and pretrial activity would be fundamentally the same. To the reasonably informed observer, it

would all be the same. So if it turns out that the 10b-5 claim against Arconic is in or out based on what the Court of Appeals would say, it really doesn't change the arc of the case.

Ms. Gilmore, appropriately, was a teeny little bit more guarded that there could be a little bit of difference. But what I took away from her answer to my question was: Judge, it really isn't going to change the discovery and the pretrial action if the 10b-5 claim stays in or doesn't stay in.

Do you have a perspective on that from the defense side, Mr. Vizcarrondo?

MR. VIZCARRONDO: Yes, Your Honor. That just can't be. For one thing, with respect to class certification, the classes -- the classes would be radically different. Now, if the 10b-5 claim is eliminated from the case, you're left with a class of purchasers of a single security over a basis of a one-year period.

If the 10b-5 claim is left in the case, then you're left with a class of composite purchasers of several securities with regard to eleven different statements pled over -- I believe it is a four-year period. The class would be radically different and the class certification motion would be radically different. And the scope of discovery on the merits would, of course, be radically different. Scienter knowledge would not be in the case. Reliance would not be in the case, but that's not an issue under Section 11 and it is under 10(b).

Ms. Gilmore says that the discovery of the Section 11 claim would be the same because they still have to prove a falsity at the time. But that's different from having to prove and taking discovery on as to knowledge with respect to the alleged falsity at the time, which is much, much, much more expansive.

And again, in the 10b-5 case, you're talking about eleven different statements over a four-year period, whereas in the Section 11 case, you're left with one statement, really a fragment of one statement, in one offering document with regard to trades of a little more than a year.

So it really defies common sense to say that the scope of the case would not be really substantially different, and resolution of the case would be more facilitated if it turns out that the 10b-5 case claim should be dismissed in its entirety.

THE COURT: Appreciate you answering my questions, Mr. Vizcarrondo. Some of your answers may have picked up things you wanted to make sure you told me anyway. But in the event that they didn't, I'm happy to hear anything else you want to say before we flip over to Ms. Gilmore.

MR. VIZCARRONDO: Okay. Well, not really, Your Honor. I mean, I think our papers set forth well why we think that an interlocutory appeal at this time would be appropriate.

I'll just state in summary that the issue of corporate scienter and then whether the 10b-5 case should stay in the case

at all is really crucial to this case. It's crucial to the scope of the case. It's crucial as to its resolution.

The Third Circuit, it has addressed that issue over the years. In the Tyson Foods case, a non-precedential opinion in 2005 basically ruled that you can't plead the scienter of the corporation if there's no individual corporate officer that's alleged to have acted with scienter that's named as a defendant. And the cases after that, well, it refused to address the merits of whether there should be a corporate scienter case claim is viable -- theory is viable in the Third Circuit, and so what the scope of it would be.

In each of those cases which the district court had denied the motion, had dismissed the case, it had rejected the corporate scienter theory, the Court of Appeals agreed. And if anything, if you read those cases, they indicate great skepticism as to the corporate scienter theory.

And again, in the most recent case this past summer, the 695 pension case, it indicated that a claim that is based solely on the alleged fraud of these employees of a foreign subsidiary would not suffice in the absence of participation by the corporate defendant parent, such as in a cover-up. Nothing of which -- nothing like which is pled here.

This is a crucial issue. It will have a great effect on how this case should go forward. And the Third Circuit, you know, it had never addressed the issue in a situation where the

district court said that a case could go forward on a corporate scienter basis. So this would be really a prime opportunity for it to address -- to squarely address that issue.

THE COURT: Appreciate that, Mr. Vizcarrondo. And I'm going to backtrack on a promise that I made to counsel a few minutes ago, and that was that I had no more questions, and I actually do have one more for you. And it's going to be a parallel question that Ms. Gilmore will have a chance to answer.

I'm not sure -- as part of the formal 1292(b) case law, this is a factor I need to consider, but I also don't think it's a factor I'm prohibited from asking about and learning about. It just may not turn out to make a difference.

Given that the circuit, and certainly Judge Phipps's opinion from August, they had an opportunity to address the issue of the viability of the corporate scienter liability theory head-on; they did not. It ended up as a non-precedential opinion. I suspect it would have been a precedential opinion if they did. But it appears they've not directly dealt with it, and that's one of the limited short list of things the parties in this case agree on.

Why is this the case that you've concluded -- you, being you, your team -- have concluded the circuit may well take on the issue? Why would this one be the one? And therefore, there really is a legitimate thing to pony up to them to have a chance to say yes or no on because, unlike the prior cases where

they elected not to address this head-on, this may actually be the one that they would take it head-on.

MR. VIZCARRONDO: Well, because, as I said, Your Honor, in the prior cases, the complaint was dismissed at the district court level. So while they, again, expressed skepticism, I think, generally with regard to the corporate scienter theory, they did not have to address it. They just say that they agreed with the district court and that would be it.

If it's presented here, it's a situation where the case will go forward or not go forward on the basis of what the law is, what the standard is with respect to corporate scienter. So it is different than the prior cases.

And if you do give us leave to go to the Third Circuit and the Third Circuit certifies, it will give them -- it will be a case where they really have to address the issue of whether in the Third Circuit the corporate scienter theory is viable, and if so, what are its parameters.

THE COURT: Appreciate that, sir. Again, your answer's complete enough that I have to ask you another question. I will confess, I would not know how to go about -- personally go about researching the question I'm about to ask you. I'll bet you Ms. Agama would and all of the other lawyers on this call would.

Do you know whether or not this question, or one that's functionally the same, has previously been advanced to

the Court of Appeals in a 1292(b) request and had it denied? Do you know whether or not the Court of Appeals has had to confront whether to take a 1292(b) certification on the question of corporate scienter.

MR. VIZCARRONDO: It was presented to interlocutory appeal, I believe, in the Cognizant case, which is mentioned in the briefs. But what happened there was the district court gave leave to appeal to the Third Circuit. And then when it reached the Third Circuit, by that time the case had radically changed because corporate officers were indicted, and the corporation, I believe, was indicted or charged by the SEC. So both the plaintiff -- and that's radically different.

And I think it is clear that at that point if the -- if corporate officers are indicted and therefore -- and the corporation is indicted, it wouldn't be too hard to amend the complaint to plead the scienter of the corporation because you'd also be naming on the basis of the indictments the individual corporate defendants who were indicted.

So by agreement of the plaintiff and defendant, the Third Circuit basically with -- the petition of interlocutory appeal was essentially withdrawn and sent back to the district court to decide whether leave should be taken in view of these facts that would be -- that would radically change the case. And the Third Circuit expressly said that it was -- their sending it back to district court was without prejudice to going

back to the Third Circuit if the district court did not allow leave to amend.

THE COURT: That's sort of the Cognizant one that's mentioned in Judge Salas's opinion where she ultimately denied 1292(b) certification on the second go-round.

But you're saying the first time it went to the circuit, they didn't decline to take it on interlocutory review because it shouldn't have been taken on interlocutory review. It was because they thought there was an issue that required the district judge to weigh back in. So it went back down, sort of went through the cycle once again.

MR. VIZCARRONDO: That's correct, Your Honor.

THE COURT: Okay. Appreciate that, Mr. Vizcarrondo. Is there anything, because of the questions I asked you, you want to add to your argument?

MR. VIZCARRONDO: No, Your Honor.

THE COURT: Appreciate that.

Ms. Gilmore, the floor's yours. I don't have any other warm-up questions because I took you out of turn and asked those first. So I'm happy to hear your response to anything Mr. Vizcarrondo said today or anything else you want to say.

MS. GILMORE: Sure, Your Honor. Just on the last point, you had the -- Judge Walls, who was the judge before Judge Salas took over in the Cognizant case, he had certified the issue because he had picked one of the -- he had rejected

one of the nuances of corporate scienter doctrine over another. He rejected the narrow principle because he thought it would allow defendants in some cases to evade liability, and that's why he certified the issue itself.

The Second Circuit refused to take the case when it was -- they were told by plaintiff that they intended to amend the complaint. And as you recognize, a second time around in front of Judge Salas, the defendants again raised the issue of corporate scienter which Judge Salas, just as in this case, which I think is on all fours, in re Cognizant declined to certify the issue.

Counsel for defendants stated at least twice that the Third Circuit has expressed great skepticism about the corporate scienter theory. The Third Circuit has done no such thing. They had had the opportunity to say they expressed skepticism. They never did it. Not just that, but they had the opportunity to say: We do not recognize the issue of corporate scienter. It could have taken one sentence for them to do that; they did no such thing. In each case they left the issue to the competent hands of the district court judges who have applied the issue as it is right now to the facts of their case, which is what this Court has done.

I wanted to also mention that defendants now hang their hat on Tyson in some ways. I really don't understand why. Tyson was never mentioned by defendants in their motion to

dismiss, nor was it mentioned in their opposition to -- in their reply for the support of their motion to dismiss. I think it's because it was an implicit understanding by defendants that their case is completely irrelevant here. In Tyson --

THE COURT: Well, it could be because it may be Mr. Vizcarrondo and his team, you know, they didn't have to see my fingers get burned when I've cited NPOs in decisions that I've issued, and the Court of Appeals has gently and sometimes not so gently with me, and even in affirming me, have said: We're doing it for reasons that we've said are precedential, not the NPOs that you've relied on. So if Tyson was an NPO, maybe that's why Mr. Vizcarrondo didn't cite it.

MS. GILMORE: I think there were others, Your Honor, that were non-precedential which Mr. Vizcarrondo had cited. Be it as it may, that case is completely not relevant here. The court there didn't even mention, let alone discuss the doctrine of corporate scienter. And the five decisions in which the Third Circuit did discuss the issue of corporate scienter after Tyson, not once -- not once, cited Tyson. Tyson is also factually distinguishable. And as to the --

THE COURT: One of the points Mr. Vizcarrondo made, if I heard him correctly, was the circuit has not been confronted -- his research, his team's research, has not revealed a case where the Third Circuit on review, appellate review, has had to address a decision of a district court where

the district court applied the corporate scienter doctrine, at least not in a situation where it had applied it outside of the alleged scienter of a named defendant officer.

And Mr. Vizcarrondo says one of the reasons this is different, Judge, and this may be the one, is you said it existed, and you applied it, and the case is marching on. And that's a procedural position that Court of Appeals has not yet had to confront.

Has your research revealed anything different, Ms. Gilmore?

MS. GILMORE: I think that is a distinction without a difference -- at least based on the five cases, the recent five cases that the defendants have put in their brief, that is a distinction without a difference.

The Court of Appeals had every opportunity to discuss the issue of corporate scienter. They never did. They actually implicitly seemed to acknowledge the broader theory of scienter.

So just to say that just -- I just don't see that as the exceptional circumstance of -- any defendant can come in and come up with a particular set of facts and say, well, my facts are really here. So really justifying this case review --

THE COURT: But let me ask you this. I know you read the Third Circuit's opinion in Ellis and I know you read my opinion in Ellis because you talked about it. And one of the reasons I certified that was that -- the two reasons, when you

get to the very last two pages of the opinion where I indicated that I was going to certify the question that was before the Court and then did in the order, was -- I said, this is a big-deal question because it impacts the national economy.

In that case it was what I concluded, and the Third Circuit agreed, was an apparent tension between two important federal statutes: The United States Bankruptcy Code, which has its genesis in the Constitution, and the various fair employment practice cases -- laws that Congress passed beginning with the Civil Rights Act of 1964. So I said, this is a big-deal question because it impacts fundamental federal interests, and it's going to keep coming up. So I said, you put those two things together; I think the Court of Appeals ought to have a chance to decide to take it, and they did.

Isn't this corporate scienter issue under 10(b), and particularly if it exists, can it be generated as a theory of liability based on anything other than the state of mind of a named corporate officer defendant? Isn't that an important question in the national economy? And isn't it one that is likely to recur? Don't the cases that both teams have cited here demonstrate that it's likely to recur?

Now, the Court of Appeals could disagree with that or disagree that those are weighty interests. But aren't the same principles in application here? When I certified the GL vs. Ligonier School District case, again, I said the same thing: I

think this is a big deal because it affects the ability of the parents of every student who may be IDEA qualified for a free and accessible public education, and it's going to keep coming up. And I cited other cases that indicated that it kept coming up.

And I know, I guess, literally you could say that about a tort case or any contract case, and not that those aren't important principles of our common law; they are, but the stakes are pretty high here.

I mean, aren't those two factors, don't they weigh in favor of letting the Court of Appeals decide whether this is, as Mr. Vizcarrondo would argue, "the case" to take this question on because it's a big deal, it's important in the national economy -- international economy, but I'll keep it in our borders for the moment -- and it is likely to repeatedly come up in litigation of significance? Consequence.

MS. GILMORE: Your Honor, this case has been repeatedly, right, presented to -- the issue of corporate standard has been repeatedly presented on no less than five occasions in the past few years to the Third Circuit. If the Third Circuit thought it was such a fundamental issue when it reached the Third Circuit, thought it should really take a position on whether or not it's going to reject it altogether, it would have done so as recently as this past year.

And I wanted to also point out that the Third Circuit

opinion from PAMCAH, the Third Circuit, it didn't break any new ground. As Your Honor specifically mentioned, the case simply stated that just imputing the scienter of somebody at the subsidiary to the corporate parent is not sufficient, and I quote, merely by dint of ownership. It didn't say anything else.

THE COURT: Right.

MS. GILMORE: And Your Honor has specifically addressed this issue in your opinion -- and I'm looking at page 44 -- again, because this non-precedential Third Circuit opinion did not break new ground.

Your Honor specifically said, "The scienter of an officer of a subsidiary may be imputed to the subsidiary's parent if the plaintiff adequately alleges that the parent company 'possessed some degree of control over, or awareness about, the fraud,'" citing to Valentini and Makor Issues and another Third Circuit case, Winback and Conserve Program.

So again, Your Honor acknowledged that issue, acknowledged that it's -- you cannot -- we agree with that; you cannot raise the issue of corporate scienter imputed from an officer of a subsidiary to a corporation merely by dint of ownership. But that's not what we did here.

The defendants don't like the results, but Your Honor has found that the complaint sufficiently alleges, through corroborative evidence from confidential -- several confidential

witnesses and documentary evidence, that Arconic Inc. did have control over Mr. Wehrle and Mr. Schmidt. So this case is on all fours and it's completely -- I don't see the Third Circuit opinion as breaking any new ground. It doesn't say anything that this Court didn't know and didn't address in its opinion.

THE COURT: Let me ask you this, Ms. Gilmore, and I understand -- and I've pulled up page 44 and was looking at it as you were accurately noting what I said in that opinion. And the observation I'm about to make, which will have a question at the end of it, I promise you, so you'll have a chance to respond to something. And this could come off by me as being economically insensitive, and I don't intend it to be, but I do intend it to be pragmatic.

All anyone needs to do is look at the lineup of the lawyers that we have on our proceeding today. These are some of the most experienced, engaged lawyers in their slice of the legal profession around the country, maybe beyond the country, but certainly around the country. And no matter what -- whether the 10b-5 claim stays in the case or not, these are the lawyers that are going to be engaged playing at the top of our common profession.

Given what the arc of the case will be, whether the 10b-5, and given the role the 10(b) claim plays in this case and given what will inevitably unfold as the case marches forward, whether it's a Section 11 and 10(b) claim or just a Section 11

claim -- because your observation, Ms. Gilmore, is it's not really going to change the arc of the discovery, which I think by any fair definition is going to be a lot, and it's going to be complex and complicated.

Given that, why shouldn't this Court -- if I'm correct that this question is one that is a big deal under our law and is highly likely to recur, and past is prologue, I recognize that any task in the case costs time and money. I recognize any task in the case causes time to resolution. But in the grand arc of this case, why wouldn't now be the time to give the Court of Appeals the chance to say no? Judge Hornak, we disagree, it isn't that big of a deal issue or it is not that likely to reoccur or there really isn't a substantial grounds for difference of opinion on controlling law or it's too fact bound. They may say any or all of those things. Or, as Mr. Vizcarrondo argues and hopes, they'll say, we'll take it.

But either way, isn't now, as between now and at the end of judgment, or if we get the class certification and the Court makes a class certification decision -- and I apologize I'm not as on top of it as you folks are. I think it's Rule 23(c) that allows for an immediate appeal -- I don't think it's 23(d); maybe it's a little further down the alphabet -- allows for request for an immediate interlocutory appeal of the class certification decision. Isn't now the best of the times to give the Court of Appeals a chance to decide whether they

want to address this question rather than one of the junctures that will come later, final judgment, Rule 23 certification?

Why isn't now the time -- and if the Court of Appeals wants to say forget about it, okay, they do. But why isn't now the time to give them the chance to decide what they want to say about the corporate scienter principles?

MS. GILMORE: Your Honor, first of all, I think that that question presumes that the courts are indifferent to the passage of time to the plaintiffs and the class. I mean, many of the class members are pensioners and many are in their --

THE COURT: But no offense, Ms. Gilmore, you're the ones that want to keep amending. You want to file a fourth complaint. So, you know, I know the Court has not been as quick on the draw as we normally take pride in around here in Chambers 6A. The pandemic's had a little effect on that, but I'm not going to make any excuses. We're not quite as quick on the draw as we normally are. But you guys are the ones that want to keep changing the case. So it's a little brassy to say others are, including me, delaying this.

MS. GILMORE: Your Honor, we don't think there is a need to amend at all. We think, as Your Honor decided, the facts are sufficiently pled here to plausibly impute the scienter of Mr. Wehrle and --

THE COURT: Yeah, but you want to engage in wait-and-see pleading because you're saying, but if it turns out

they're not, Judge, we want to shovel some more in. And that doesn't fly in the circuit, and it certainly doesn't fly here.

MS. GILMORE: Your Honor, we would only do that if the Court deems that's a game changer. We don't think there is a need to do it. We think that complaint plausibly sets forth the facts --

THE COURT: So if I grant leave for the 1292(b) motion to be filed and Mr. Vizcarrondo's team files it, part of the opposition will not be we have other stuff we want to amend with because it's unnecessary?

MS. GILMORE: I can't promise that, Judge. I can't prejudice the class. I don't know what they're going to argue. I don't know whether the Third Circuit -- certainly the Third Circuit should be entitled to have a full view of the facts in front of it if it decides to --

THE COURT: So you will argue -- I mean, you know what Mr. Vizcarrondo's petition is going to look like. Unless there has been some new cases that came down since this pension 675 case, it's going to look a whole lot like his brief here. I mean, they may jazz it up a little bit based on what you filed in response.

My question is: If the petition is filed at the Court of Appeals because I grant leave to file it, are the plaintiffs going to contend that it should be denied by the Court of Appeals because the plaintiffs are going to seek leave to

further amend? Or are you going to say what we have is good enough?

MS. GILMORE: I think we would reserve our rights to raise both arguments. Certainly the first one --

THE COURT: You might have to do it in eleven days, Ms. Gilmore. So I don't know what else you're going to have to think about, because if I grant the motion tomorrow -- I'm not saying I will or won't, but I could -- then Mr. Vizcarrondo's team's going to file it ten days from tomorrow, and you're going to have to then respond --

MS. GILMORE: Your Honor --

THE COURT: -- if you choose to respond. So are you going to argue that you want to amend further?

MS. GILMORE: As I sit here, in all honesty, I don't want to prejudice the class. So probably, yes, I would argue in the alternative that we should be entitled to amend and present additional facts that maybe the Third Circuit in the unlikely event, yeah.

THE COURT: So it circles back to my first point. Okay, I get it.

MS. GILMORE: Right. Your Honor, again, this -- you know, I don't think this case involves the exceptional circumstances that would warrant certifying the issue --

THE COURT: Would there be any? Could there be any --

MS. GILMORE: Yes.

THE COURT: -- in the corporate scienter situation? What would be an example? I'm not saying it's limited, but what would be one example from the list of exceptional circumstances?

MS. GILMORE: I think if a district court decides that I will not recognize the doctrine of corporate scienter, I think that would be the perfect case to take to the Court of Appeals.

THE COURT: But Mr. Vizcarrondo says the prior five of them -- well, he's saying they dismissed it. So, Ms. Gilmore, you're saying in the prior cases where the Court of Appeals has declined to directly answer the question, in each of those cases the district court said it exists --

MS. GILMORE: Correct.

THE COURT: -- but the pleadings weren't good enough to get over the line?

MS. GILMORE: That's correct, Your Honor. And in one instance, which was the one with Judge Walls, he didn't acknowledge the narrowest nuance of the document of corporate scienter because he was concerned that it would give defendants carte blanche to basically evade liability if it were such -- if it were applied in such narrow circumstances.

I do want to make two points, Your Honor.

THE COURT: Let me just make sure I'm clear on the last point, and then we will make sure you have plenty of time to make other points.

You're saying if I go back and reread the other Court

of Appeals cases, our circuit, on this topic, what I'm going to find is the district court in each of those cases said the principle of corporate scienter-based liability exists, but in that specific case, it has not been sufficiently plausibly pled. And the Court of Appeals ended up affirming them without having to decide definitively whether or not the doctrine exists?

MS. GILMORE: Yes, that is my under --

THE COURT: You're saying there's not a Court of Appeals case where the Court of Appeals had before it a decision of a district judge that said the corporate scienter principle does not exist?

MS. GILMORE: That is my understanding, Your Honor. As I sit here, that is my understanding. It has never been the case.

THE COURT: Got it.

MS. GILMORE: Now, I did want to mention two points. I know we mentioned it in our opposition. One is that the defendants -- just as the defendants did in re Cognizant Technology -- did not argue that the Third Circuit will reject the doctrine of corporate scienter altogether.

I can tell you, Your Honor, it's Docket Number 112 at page 16 of plaintiffs' -- of defendants' motion to dismiss. The same heading -- the same title as the heading or the title of the argument made by defendants in Cognizant. Defendants simply stated: The Third Circuit has not adopted collective scienter.

And if I go to the Cognizant opinion, Judge Salas makes a specific point as to that in Footnote 4. The opinion is 2021, Westlaw -- one second, please -- 1016111. Judge Salas notes, and I quote: "Although Cognizant notes that the Third Circuit has never accepted the corporate scienter doctrine, it does not argue that the Third Circuit would reject the doctrine altogether." The same argument that defendants made here.

The other point I wanted to make is that defendants now claim that they did argue for a fourth approach of corporate scienter, the so-called extraordinary circumstances approach. But that is not a fourth approach. That is the existing law which applies the broader theory or nuance of corporate scienter that has been adopted or espoused by the Second Circuit and the Seventh Circuit. So it's not a fourth different standard.

And this Court has specifically noted that plaintiffs do not put forth a theory of exceptional circumstances because this is not the case that would involve that theory because here, unlike in those exceptional circumstances cases, we are able to plead specific individuals who have acted with scienter.

So it's not a new fourth theory that the defendants claim they now have come forward with. It's actually subsumed under the existing broader nuance of corporate scienter.

THE COURT: Appreciate that, Ms. Gilmore. Let me ask you this: If you did amend, would you name as a specific defendant Diana Perreiah as a 10(b) defendant?

MS. GILMORE: I think we're likely to name her, yes, because she's -- to our knowledge, she's employed by Arconic Inc.

And also, I note defendants now take issue with it, but Mr. Schmidt specifically testified in his first day of testimony that he had a role in Global Arconic, in the parent company.

THE COURT: This is his testimony over in England in the hearings over there?

MS. GILMORE: Yes. That he had a role in Global Arconic which was separate from his role in the subsidiary and that he directed -- reported directly to Diana Perreiah.

I know defendants now are pointing out some ambiguities about that testimony which they tried to clarify, but I don't know whether it was -- I don't want to suggest it was witness coaching or not, but this was the testimony that Mr. Wehrle gave the first day of his testimony. It was in open court.

THE COURT: And at the pleading stage, everybody would have to take as true the words that he said. If there are inferences to be drawn or challenges to its --

MS. GILMORE: Right.

THE COURT: -- credibility, they're collateral; that would have to come up in a collateral proceeding.

MS. GILMORE: That's correct, Your Honor. The courts

would interpret all ambiguities in a motion to dismiss stage in favor of the plaintiff. But our understanding is that Ms. Perreiah is employed by Arconic Inc.

MR. VIZCARRONDO: Your Honor, if I may?

THE COURT: We'll circle back in a minute, Mr. Vizcarrondo. I know you want -- and I want to hear from you on that point, but I want to make sure that Ms. Gilmore has had a chance to say what she wants to say. And I have to make sure I don't have any last lingering questions. And then we'll circle back to you as the proponent of the motion.

Ms. Gilmore, the floor remains yours.

MS. GILMORE: I understand, Your Honor, so that if you were to grant such a -- 28 USC motion that you would impose a stay. So I don't know -- I had some cases to cite to the Court. But if it will not make a difference, I will not cite them. They were cases in which the district courts and some circuit courts have -- are using the -- applying the traditional stay factors that have been espoused by the Supreme Court and by the Third Circuit itself.

THE COURT: I apologize, Ms. Gilmore. I had to shut another device off. I'm not sure it's a circumstance all of you have had to confront more than once recently.

I don't want to say that I wouldn't listen to counsel, Ms. Gilmore, and I'm happy to hear from you. I will say this: At least based on the limited experience I've had, the up and

back to the Court of Appeals has been so swift that I -- if I granted the 1292(b) motion, in all likelihood, absent some exceptional reason not to, I would keep the case on ice until we heard back from the Court of Appeals.

Now, they could say, even if they took it, we want everything else to keep going, and I would keep going. But if I granted the defendants' leave to take a run at this question with the Court of Appeals, I almost certainly would stay the case until we all heard back from the Court of Appeals.

MS. GILMORE: Okay. So I don't think I will be citing those cases, then.

THE COURT: Okay.

MS. GILMORE: If the Court would like me to cite them I will, but otherwise, I don't -- based on your -- what Your Honor said, I don't think it's necessary.

THE COURT: Okay. That's fine, Ms. Gilmore. Anything else you want to talk about, ma'am?

MS. GILMORE: No. Again, as we said, I don't think there is a controlling question of law here because the district court did not reject the theory of corporate scienter altogether. Defendants did not argue below -- I mean, in front of you that such -- that the Third Circuit will never -- will never accept the theory of corporate scienter. They didn't --

THE COURT: And should not. And should not.

MS. GILMORE: And should not. They never put forth a

fourth approach. The exceptional circumstances approach has been subsumed under the existing law.

And every single circuit court that has decided the issue of corporate scienter or addressed it at all found that the doctrine is alive and well and have applied it. Maybe with different nuances, but they have applied it.

THE COURT: I got it. I appreciate that. It's very helpful. Thank you.

MS. GILMORE: Thank you.

MR. VIZCARRONDO: Your Honor --

MR. ROSENFELD: Your Honor?

THE COURT: Mr. Rosenfeld?

MR. ROSENFELD: Good morning, Your Honor. If I could be heard for a minute? I represent --

THE COURT: Yes, because I'll make sure if there's anybody else on either team that wants to weigh in, we'll give them a chance.

MR. ROSENFELD: Is now a good time?

THE COURT: Sure.

MR. ROSENFELD: Thank you, Your Honor. Just to clarify one point made by Ms. Gilmore regarding the Section 11 burden of proving knowledge. I just want to clarify it's not to prove knowledge because what -- the allegation here is a statement about Arconic's belief. So we certainly would be entitled to discovery on their knowledge; it would not be

limited to their knowledge. It's not a requirement to prove their knowledge to successfully plead a Section 11 claim. That's point number one.

Number two, the Court had mentioned that --

THE COURT: So if they had an actual but incorrect belief that still is enough?

MR. ROSENFELD: Right. Or at least know what the basis would be for their belief.

THE COURT: Understood.

MR. ROSENFELD: And with regard to the Court's statement that if the -- if it were to grant the defendants' motion and stay the case, we would ask that the stay not extend to the Section 11 claim because we have not really seen a basis to do so. Defendants want to keep the case on ice for as long as they can, so that would be prejudicial to the Section 11 case, the class. So we would ask that it not be extended to them.

THE COURT: I have to say, Mr. Rosenfeld, it's possible, but unlikely, that I would do a partial stay. If this is going up to the Court of Appeals -- and that may be an argument that the plaintiffs would make as to why the Court of Appeals shouldn't take it, or that if I did grant a stay the Court of Appeals should modify it. But it's likely -- not certain, but likely -- that if I did grant the motion to file the 1292(b) motion with the Court of Appeals, that I'd keep the

entire case on ice until the Court of Appeals had disposed of it one way or the other, which could be to grant it, it could be to deny it, could be to grant it and to modify any stay and say litigation should continue in the district court while we sort out the 10b-5 thing. But I probably would not do that one on my own.

I understand the basis for the ask. It's not an unreasonable ask. It's not irrational. But I'd probably -- if I would stop the presses formally with the stay order, I would likely do it as to everything until we heard from the Court of Appeals.

MR. ROSENFELD: Thank you, Your Honor.

THE COURT: You're welcome, sir.

Anyone else from the plaintiffs? And I would have done this anyway, Ms. Gilmore. There's nothing that I found incomplete about your presentation, either in writing or on the video today. And, Mr. Rosenfeld, I appreciate you adding a few grace notes to it. But is there anything anybody else from the plaintiffs' side wants to say?

MS. GILMORE: No, Your Honor.

THE COURT: Okay. Thanks, Ms. Gilmore.

Mr. Vizcarrondo, you had something you wanted to say before, and it was not inappropriate to bring it up. I just moved the timing of it. But you have a right to reply because you're the proponent of the motion.

MR. VIZCARRONDO: I understand, Your Honor. Briefly, with respect to Diana Perreiah, it doesn't matter whether she's an officer of Arconic Inc. now. I don't believe that she is an officer of the relevant time period.

But beyond that, and more importantly, if they -- I don't believe that they will amend the complaint to allege a claim against her because if they do, they have to allege that she made a public statement -- a public statement that was false and misleading with scienter.

And in the document which they provided to the Court, there's no indication about any public statement that Diana Perreiah made that would be relevant to this case, let alone that she acted -- that she made the statement knowing that it was false and misleading.

For example, with respect to Mr. Kleinfeld, they allege that he had made certain public statements which they alleged were the basis of the 10b-5 claim because at the time he made them he had scienter that he knew that they were false and misleading.

Your Honor dismissed the claims because you found, I believe correctly, that the fact that they alleged of his knowledge -- post-knowledge of the falsity of the statements was insufficient.

So they'd have to allege that she made a statement that was false and misleading and with scienter. And they point

to no statement that she made that would be a basis for a claim against --

THE COURT: Other than internal emails, as I understand, that they've advanced?

MR. VIZCARRONDO: Correct. Correct. Maybe some inquiries to either Schmidt or Wehrle about what they were doing -- how they handled fire testing in Europe. Nothing about whether or not the product in Europe failed to test and whether or not they made misrepresentations to anyone about those tests; there was nothing in there about that. But more important, there's nothing about any public statement she made that could be pled to be false and misleading.

And the documents also, you know, don't show any active participation by anyone at Arconic Inc. in the alleged fraud at the subsidiary level, which the 675 pension case suggests is what's required -- not just that they were delegated or deputized with respect to this product, that was actually active participation by the corporate defendant parent.

And then, I guess finally, with regards to the prior cases in which the Third Circuit affirmed the district court's dismissal of cases, cases with respect to corporate scienter, I haven't -- as we've sat here, I haven't gone back and read all those cases or the district court cases. But I don't believe that the district courts in those cases actually held that corporate scienter existed. I don't think it would be their,

really, position to do that because the Third Circuit had not spoken. I believe in those cases the district court said that it was an open question in the Third Circuit as to whether a corporate scienter theory was viable. But that even if it were, under any circumstances, the allegations in this case would not be suffice -- would not suffice to go forward on a corporate scienter theory. And that's all that the Third Circuit ruled on in affirming the cases.

Frankly, in that situation where the district court did not have to reach the question of whether or not there was corporate scienter because they found that the allegations would have been insufficient under any circumstances, it frankly would have been dicta by the Third Circuit to reach the question of whether in fact the corporate scienter theory would be viable in the Third Circuit.

In this case, if it goes up to the Third Circuit, it wouldn't be dicta. They would have to address the issue of whether corporate scienter is a viable theory in the Third Circuit, and if so, what are the requirements for it?

THE COURT: Appreciate that, sir. Let me ask you one question. And I appreciate very much Ms. Gilmore's both precision and constraint, but I do feel some obligation to follow up on something she had raised with the Court with you, Mr. Vizcarrondo.

Ms. Gilmore was about to argue, and read the room, if

you will, and sort of held her fire. Mr. Rosenfeld put just a little bit of gloss on it. But why should the Court -- if I do grant the motion, the 1292(b) request motion, the one that's now pending, and say, have at it at the Court of Appeals, why shouldn't the case proceed here at least as to the Section 11 claim? Because there's not going to be a whole lot done. But it would give the parties an opportunity to sort of get started on case management activity in terms of case management order, meeting and conferring, all of those things.

Why should I follow what would be my sort of instinctive reaction, which is to put the brakes on everything? But Ms. Gilmore argues, and was going to argue some more, that I shouldn't do that. And Mr. Rosenfeld put a little bit of a gloss on it. If I do grant your motion, why should I stay the entire case and keep it stayed until the Third Circuit does something?

MR. VIZCARRONDO: Well, Your Honor, at the very least, I believe the first order of business going forward would be a class certification motion. I think that's the first thing. And there would be class certification discovery, and then there would be motions made and argument to Your Honor.

THE COURT: Certainly your case management order might suggest segmented case management activity with one of the first items being class discovery; I understand that.

MR. VIZCARRONDO: Right. And it would be -- if the

case is going to be reviewed by the Third Circuit on this question of corporate scienter, which would determine what the classes were, whether there would be a 10b-5 class as well as a Section 11 class or just a Section 11 class. So it would be, frankly, really a huge, huge waste of judicial resources, the parties' resources to have litigation on class certification before it is determined what the potential class is. And if the case -- if interlocutory appeal is granted, that can't happen until the appeal is determined.

THE COURT: Okay. I understand, sir.

Ms. Gilmore, I sort of cut you off on that question. But I reopened the door, if you will, a little bit with Mr. Vizcarrondo. If there's anything further you want to say on the question of a stay at all or a scope of stay, I'm happy to hear from you. I don't want your self-restraint to make you believe you didn't have a fair opportunity to tell me what you think I should know.

MS. GILMORE: Certainly, Your Honor, we did argue in our papers that the Section 11 claim should not be held hostage to any decision with respect to the Section 10(b) claims because the scienter element is not an element of the Section 11 case. So it would not impact those claims. Of course, the class -- we can always move to certify class only or a subclass of the Section 11 claims. Again, the case should not be hostages to that.

I did want to cite to the Court, and I will now, cases where courts have applied the traditional stay factors espoused by the Third Circuit in -- and we cite Westinghouse, which is a Third Circuit case. And those cases are -- even circuit courts have applied the traditional tests to interlocutory appeals in the context of here -- in the context of class certification context, but the policy's the same. It's, again, interlocutory appeals, and the policy is against piecemeal litigation. Those cases are:

A Second Circuit case from 2001, In Re: Sumitomo Copper Litigations vs. Credit Lyonnais, 262 F.3d 134;

And a Seventh Circuit case from 1999, Blair vs. Equifax Check Services, 181 F.3d 832.

We also found the district courts within the Third Circuit that have applied the traditional test between interlocutory appeals in the context of class certification:

Heinzl vs. Cracker Barrel, 2016, WL 5107173, Western District of Pennsylvania, June 8, 2016;

Charlot vs. Echolab, 220 WL 1546439, District of New Jersey, 2020;

And Bordeaux vs. Limited Financial Services, 2018, WL 1251633, District of New Jersey, March 9, 2019.

We also have district courts outside the Third Circuit that specifically applied the traditional stay factors in the context of interlocutory appeals, specifically brought under

28 USC 1292(b).

To start with, a recent decision from the Second Circuit issued by a circuit court judge sitting by designation from the Second Circuit. The decision is Sanders vs. Houslanger, 2018, WL 6444922;

Another case from Eastern District of Texas, 2021, Earl vs. Boeing Company, 2021, WL 1080689;

And a case called Sierra Club vs. Virginia Electric & Power Company, 2016, WL 5349081.

THE COURT: Appreciate that. Just because I couldn't write as quickly as I needed to, could you give me the cite for the Heinzl case out of this district that you mentioned earlier, Ms. Gilmore?

MS. GILMORE: Sure. 2016, WL 5107173.

THE COURT: Thank you very much.

MS. GILMORE: Thank you.

THE COURT: You're welcome.

Anyone else on the defense team want to add anything to what Mr. Vizcarrondo shared with me today, shared with all of us? I know it's bold when I do that because everyone carefully identifies their lead lawyers for good reason. And I get it; I understand it. But particularly when we're in the world of Zoom and you're not sitting right next to each other and can pass a note -- I know you can do it electronically, but in fairness, since everyone made time in their calendar and scheduled to be

here, I do want to check.

MR. ROSENFELD: Your Honor, can I add one more point?

THE COURT: Yes. But I should tell you, the proponent of a motion in our court, in my court, in the court I run, always gets the last word. So I'm happy to hear another point, Mr. Rosenfeld, but I'll make sure Mr. Vizcarrondo has a chance to say anything.

MR. ROSENFELD: And it's just to respond to what Mr. Vizcarrondo mentioned a few minutes ago. And that is with regard to class certification, he had suggested that there would be a bifurcation of discovery for class --

THE COURT: I actually said that that would be the first thing out. But he said that that would -- but I might do that. But go ahead, sir.

MR. ROSENFELD: Right. So that's highly unusual to have bifurcated discovery. Usually discovery precedes the pace, both fact discovery and class discovery. So I don't see there would be a reason to bifurcate them.

In any event, obviously, there would be different classes seeking to be certified here, a class on behalf of the Section 11 claim and a class on behalf of the 10(b) claim. So that should certainly not be a basis for pausing Section 11 claims to proceeding.

THE COURT: So would implicit be in what you've just told me, if I were to conclude that Mr. Vizcarrondo was closer

to being correct than maybe others, that the scope of the cases to the Section 11 claim and the discovery in the pretrial action, if you will, would be more limited because it would relate to part of one or one statement made relative to one security in a relatively short period of time? You're saying, if anything, Judge, at least let us do what needs to be done, even if it involves class certification issues as to the Section 11 claim, because it's not going to be as big a deal. It will be a big deal, but relatively speaking.

MR. ROSENFELD: Exactly. He can certainly start with the Section 11 and then add on what needs to be added on for the 10(b).

THE COURT: Understood. Appreciate that, Mr. Rosenfeld.

MR. ROSENFELD: Thank you.

THE COURT: Before I hear from Mr. Vizcarrondo, Ms. Gilmore, since I identified you as being in the pilot seat for the plaintiffs, is there anything you want to add to what Mr. Rosenfeld just said?

MS. GILMORE: No, I think we made that point in our paper. And it's true the Section 11 claim should not be held hostage, and certainly, courts permit class certification of subclasses. So, as I said before, we can have certification of a subclass of Section 10 or versus Section 11.

THE COURT: Understood. Mr. Vizcarrondo, I promised

you, as the moving party you get the last word.

MR. VIZCARRONDO: Your Honor, if you allowed us to take an interlocutory appeal and if it went up to the Third Circuit, I think and I hope that we would win on the Third Circuit, and that would be the end of the 10b-5 case.

But if it was not and the 10b-5 claim survived and in the meantime there had been discovery, both as to class certification and on the merits with respect to the Section 11 claim, will the plaintiffs say, oh, that's enough, we don't need any more discovery with respect to the 10b-5 claim because the discovery we have been taking as to the Section 11 claim is sufficient? I seriously doubt that.

So we'd be subject to at least two rounds of discovery, two rounds of document searches, two rounds of search term searches, et cetera, et cetera, which, and with all due respect, would be extremely, extremely burdensome while we're waiting for the Third Circuit to hopefully give us a definitive answer on what this case will be about going forward.

THE COURT: Understood. I understand both your position and Ms. Gilmore's --

MS. GILMORE: Your Honor --

THE COURT: -- and Mr. Rosenfeld's.

MS. GILMORE: -- if I may respond to that?

THE COURT: You may, but Mr. Vizcarrondo's going to get the last word. But you may.

MS. GILMORE: Okay. We did cite many cases to this Court -- I don't have them handy right now -- that refused to stay certain claims that would not have been affected by an interlocutory appeal. So that would not be reason enough to just hold the Section 11 claims hostage.

THE COURT: Well, I understand. But I actually didn't hear that being Mr. Vizcarrondo's argument. His argument, I viewed as having a legal basis but having a having pragmatic thrust which was: Judge, if you let the section -- here's what I heard, Mr. Vizcarrondo, and if I shouldn't have heard this, you'll tell me. Judge, if you let the Section 11 claim discovery get going and move on while this case is up at the circuit, and if the circuit comes back and says corporate scienter theory of liability exists, and on the second amended complaint or even what the plaintiffs say would be in the third amended complaint, it plausibly could go forward, you're saying, just as a practical matter because the plaintiffs have really good lawyers, just like the defendants do. There's going to be a significant amount of do-overs of discovery that was already done because it can't be -- what I heard you argue was: It can't be neatly, easily, and conclusively cabined or categorized as pure Section 11 discovery and pure 10(b) discovery.

Did I hear you right?

MR. VIZCARRONDO: Yes, Your Honor. You said it better than I did.

THE COURT: Well, I don't know about that. I was just saying what my ears heard, not necessarily what you said.

I think we have to call it quits right there. So this matter is submitted.

Ms. Gilmore, anything else not related to what we -- not focused on what we've already talked about but different that you want to talk about?

MS. GILMORE: How is the weather?

THE COURT: It's cold. Is winter. It's winter. Just as it probably is -- you're in Manhattan, Ms. Gilmore?

MS. GILMORE: Yes, yes.

THE COURT: Yeah, it's winter in Manhattan too. It's bright, but it's winter.

Mr. Vizcarrondo, anything you wanted to talk about?

MR. VIZCARRONDO: Nothing more, Your Honor. And thank you for your patience and opportunity to --

THE COURT: No, no, you folks and your clients have been the ones that are patient.

I will say one of the things I don't think the argument has changed my mind on is this is a significant case involving significant legal and factual issues. What we do with all of that may be a different question.

And frankly, looking at this lineup of lawyers, I think, is tangible confirmation of that assessment. So I appreciate the care and preparation and thoughtfulness and vigor

with which you've argued the position. We're going to work on getting this out as quickly as I can.

Look, this is not the standard of speed we normally do here in 6A. It just isn't. But, just like you, I have to play the hand I'm dealt. And unfortunately, this motion had to get behind other motions, including a plethora of motions for emergency release from either BOP or local custody. And I don't like that we're in the situation that those motions even had to be filed or that we had to deal with them or it got in front of yours, but it did. So I appreciate you and your clients' bearing with the Court as we all work through this.

I hope everyone and your colleagues and families have a safe, healthy -- stay healthy -- new year. I know this is not the last time we'll talk no matter what happens and not the last time we'll be convening on this case. So I hope, certainly forever, but certainly between now and then, everyone on this call, those you work with, those you're close to, have a great new year and that you stay healthy and safe.

MS. GILMORE: Thank you.

THE COURT: Ms. Agama, anything else we wanted to talk about with any of these folks?

THE CLERK: No, Judge, that's it.

THE COURT: Thanks, Ms. Agama.

Ms. Siatkowski, all set?

COURT REPORTER: All set, Judge.

THE COURT: Thanks, appreciate it.

(Proceedings concluded at 11:50 a.m.)

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C E R T I F I C A T E

I, SHARON SIATKOWSKI, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/Sharon Siatkowski
SHARON SIATKOWSKI, RMR, CRR, CBC, CRI
Official Court Reporter